Lou's Produce, Inc. *and* General Truck Drivers, Warehousemen, Helpers and Automotive Employees, Local 315, affiliated with International Brotherhood of Teamsters, AFL–CIO.[1] Case 32–CA–11128

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On November 8, 1991, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The General Counsel has excepted to the judge's failure to find that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing employment conditions after January 1, 1990, and by withdrawing recognition from the Union on March 6, 1990. For the reasons that follow, we find merit to these exceptions.

The General Counsel established, through the undisputed testimony of Western Conference of Teamsters Pension Trust Administrator Judie Turner, that the Respondent made no contributions to the fund for hours worked after December 30, 1989, the date the Respondent's collective-bargaining agreement with the Union expired. Under the terms of the expired agreement, contributions for hours worked in January 1990 were due on February 10, 1990. The Respondent admits that these contributions were not made. There is no evidence that the parties bargained to impasse over elimination of pension benefits; to the contrary, the Respondent admits that, during contract negotiations in the fall of 1989, it tentatively agreed to continue making contributions to the Teamsters Pension Trust, at a higher rate, as part of a successor agreement. By unilaterally discontinuing pension contributions after the expiration of the parties' collective-bargaining agreement, without first bargaining to impasse with the Union, the Respondent failed and refused to bargain collectively and in good faith with its employees' representative in violation of Section 8(a)(5) and (1) of the Act.[2]

Likewise, the General Counsel established, and the Respondent admits, that it made no contributions to the Teamsters Benefit Trust for hours worked after January 1990. Contributions for hours worked in a given month were due on the first day of the following month and considered delinquent if not received or postmarked by the 20th day of the month in which the contributions were due. There is no evidence that the parties bargained to impasse over the issue of health insurance benefits.

The judge concluded that the Respondent was nevertheless privileged to discontinue contributions to the benefit trust because the Union's business agent, John Plumos, advised the Respondent on February 14, 1990, that the parties' 1986–1989 collective-bargaining agreement had been automatically renewed as a result of the failure of either party to serve notice of its intent to modify or terminate the agreement within the period of time specified for such notices in section 14 of the agreement.[3] The judge viewed this statement as a refusal to bargain on the Union's part, which then privileged the Respondent to unilaterally modify terms and conditions of employment without first bargaining such changes to impasse.[4] We disagree. When viewed in context with other developments in this case, it is evident that the Union never refused to bargain with the Respondent.

The issue of health benefits first arose in the fall of 1989. The Respondent indicated its willingness to continue participating in the Teamsters Benefit Trust, provided contributions were not required for casuals regardless of the number of hours they worked in a

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The judge's conclusion that contributions to the pension fund were not delinquent until March 11, 1990, is erroneous. Although it appears that a notice of delinquency was not sent until that date, the collective-bargaining agreement establishes that pension fund contributions for hours worked in each month were due on the 10th day of the following month. Thus, as noted above, contributions for the month of January 1990 were due on February 10, 1990.

[3] Sec. 14(2) of the collective-bargaining agreement provides: ''If neither party to this Agreement prior to sixty (60) days before December 31, 1989, notifies the other party, in writing of its desire to change, modify, or terminate this Agreement, then the Agreement is automatically extended and renewed for the following year.'' In light of the parties' having engaged in preexpiration bargaining, the General Counsel does not contend that the agreement was renewed pursuant to sec. l4(2), even though the required notices were never sent.

[4] The judge erroneously found that Plumos testified that he first advanced the renewal claim at a meeting on March 6, 1990. In fact, Plumos testified that he first made the statement about automatic renewal on February 14, 1990. The judge also found that the Respondent's unilateral discontinuance of pension contributions was privileged by the Union's February 14, 1990 contract renewal claim. For the reasons set forth below, we disagree. Moreover, as noted above, the Respondent discontinued those contributions as of February 10, l990, 4 days before Plumos' statement was made.

given month.[5] According to the Respondent, the then union business agent, Frank Coppa, agreed to this proposal but was unable to provide the Respondent with satisfactory language prior to December 31. Thereafter, Coppa was replaced by Plumos, who met with the Respondent on January 10, l990. At that meeting, Plumos refused to agree to any waiver of the normal benefit trust rule requiring contributions for employees, and the Respondent's officials told Plumos, in response, that they could not afford the Union and wanted to ''get out of'' dealing with the Union.

On February 5, 1990, the Respondent polled its employees to determine their support for the Union.[6] The judge found that the Respondent called Plumos that same day to tell him that a majority of employees had indicated they did not want the Union to represent them.

The parties next met on February 14, l990. The Respondent repeated its desire to get rid of the Union as its employees' representative, and Plumos for the first time stated that the collective-bargaining agreement had been renewed as a result of the parties' failure to serve the notices specified in section 14 of the agreement. According to Plumos' uncontradicted testimony, he also offered to work out the Respondent's problems concerning the cost of health and welfare coverage and payment of delinquent health and welfare contributions.

On March 1, 1990, the Respondent unilaterally established a new health insurance program with Kaiser, a private insurer, for its employees. On March 6, 1990, the Respondent again met with Plumos, who repeated both his assertion that the agreement had been automatically renewed and his offer to work out a payment program for the Respondent's delinquent contributions and to provide for coverage under a ''lesser'' Teamsters health and welfare plan. The Respondent rejected these offers and advised Plumos that it had obtained its own health insurance from Kaiser and that the Union had been voted out.

Under these circumstances, we find no merit to the Respondent's assertion that the Union engaged in bad-faith bargaining by stating, on February 14 and March 6, that the parties' contract had been automatically renewed. Initially, we note that these statements were, in each case, accompanied by the Union's offer to negotiate over the issue in dispute between the parties, i.e., the cost of health insurance. Moreover, the assertion concerning automatic renewal was made in the context of the Respondent's unlawful poll of employees concerning their support for the Union and its statements to Plumos that it wished to get rid of the Union.[7] Under these circumstances, we cannot say that the Union refused to bargain with the Respondent.

Even if the Union's assertion that the agreement had been automatically renewed is viewed as a refusal by the Union to engage in further bargaining, we agree with the General Counsel that this would not privilege the Respondent's unilateral implementation of the Kaiser health insurance plan. Contrary to the Respondent, its proposals to the Union never encompassed discontinuing health and welfare coverage under the Teamsters Benefit Trust, let alone the specific Kaiser health insurance plan which the Respondent implemented on March 1, 1990.[8] Cf. *R. A. Hatch Co.*, 263 NLRB 121 (1982) (employer lawfully implemented its last proposal where the union had stated ''it's the short form or nothing'' in negotiations). See also *Lawrenceville Ready-Mix Co.*, 305 NLRB 1010 (1991). Because changing from the Teamsters Benefit Trust to a new health insurance policy with Kaiser was not included in its proposals to the Union as of February 14, 1990, the date the complained of statements were first made, the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the Kaiser policy on March 1, 1990.[9]

[5] Under the 1986–1989 collective-bargaining agreement, contributions to the benefit trust were required for casuals or regular employees for each month in which the individual worked 80 or more hours. Pursuant to a side letter to that agreement, however, casuals were not entitled to any benefits, including health and welfare.

[6] In adopting the judge's conclusion that this poll was unlawful, we rely only on his findings that, as admitted by the Respondent, the poll did not comply with the secret ballot requirement established in *Struksnes Construction Co.*, 165 NLRB 1062 (1967), and that the Union was not given prior notice of the poll. See *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989), modified on other grounds 923 F.2d 398 (5th Cir. 1991). We find no merit to the Respondent's assertion that these requirements are inapplicable here because the poll was not ''used for withdrawing recognition from a union.'' The poll asked employees whether they wanted ''to remain with the Teamsters Union at Lou's Produce'' and was headed with the words ''Teamsters Union Status.'' Under these circumstances, we agree with the judge that the purpose of the poll was to determine whether employees continued to support the Union. As such, in the absence of the safeguard noted above, the poll constituted an independent unfair labor practice even if the Respondent had not relied on it to subsequently withdraw recognition from the Union.

[7] In this regard, unbeknownst to the Union, the Respondent had ceased contribution to the pension and benefit funds prior to the Union's first assertion that the agreement had renewed itself.

[8] Although Nona Alessio, the Respondent's co-owner and bookkeeper, testified that she mentioned to Coppa, in the fall of 1989, that her son had health insurance with Kaiser that was less expensive than the coverage provided by the Teamsters Benefit Trust, she never testified that switching to Kaiser was actually proposed to the Union. To the contrary, it is undisputed that, at least as of December 31, 1989, the Respondent would have continued in the Teamsters Benefit Trust if the casuals' issue had been resolved.

[9] For the same reason, we find no merit to the Respondent's argument that the Union's reneging on an alleged agreement to exclude casuals from health benefits was an act of bad-faith bargaining which excuses its subsequent unilateral actions. At most, the Union's action could have privileged the implementation of the Respondent's last offer in this regard. We also note that the Respondent introduced no evidence concerning Coppa's authority to bind the Union in negotiation or concerning its efforts to protest the Union's alleged

Continued

We also find that the General Counsel has established that the Respondent unlawfully withdrew recognition from the Union on March 6, 1990, as alleged in the complaint. The Board has recognized that a withdrawal of recognition need not be explicitly stated to run afoul of the Act; rather, the Board will examine an employer's statements and actions in context to determine whether a violation has occurred. *Paramount Poultry*, 294 NLRB 867 (1989); *Corson & Gruman Co.*, 284 NLRB 1316 (1987). As noted above, the Respondent here: (1) ceased making contributions to the pension and benefit funds without bargaining with the Union; (2) conducted an unlawful poll of employees, without prior notice to the Union, to determine whether the Union still enjoyed majority support; (3) subsequent to, and in reliance on, the poll results, declined the Union's repeated offers to negotiate the outstanding issue of health insurance, instead stating at every opportunity that it wished to get rid of the Union; and (4) unilaterally implemented its own health insurance plan, also in reliance on the poll results. We find that by these actions the Respondent effectively and unlawfully withdrew recognition from the Union after March 6, 1990.

CONCLUSIONS OF LAW

1. By failing and refusing to remit required contributions to the Western Conference of Teamsters Pension Trust and Teamsters Benefit Trust, as provided in the parties' 1986–1989 collective-bargaining agreement, after January 1990, without previously bargaining to impasse over such changes, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. By conducting a poll of its employees on February 5, 1990, to determine their union sympathies, the Respondent violated Section 8(a)(1) of the Act.

3. By unilaterally implementing its own health insurance plan on March 1, 1990, without proposing or bargaining with the Union over the change, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. By withdrawing recognition from the Union after March 6, 1990, without any good-faith basis for doubting the Union's continued majority support, the Respondent violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make whole its unit employees by making all pension and health and welfare contributions as provided by the expired collective-bargaining agreement with the Union, which have not been paid,[10] and by reimbursing employees for any expenses ensuing from the Respondent's failure to make such contributions as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest to be computed in the manner prescribed in New *Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall also order the Respondent to recognize and, on request, to bargain in good faith with the Union concerning the wages, hours, and other terms and conditions of employment of unit employees and to reduce to writing any agreement reached.

We shall also order the Respondent to, on request by the Union, rescind the unlawfully implemented health insurance plan.

ORDER

The National Labor Relations Board orders that the Respondent, Lou's Produce, Inc., Richmond, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with General Truck Drivers, Warehousemen, Helpers and Automotive Employees, Local 315, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining representative of the employees in the unit described below by: (i) failing and refusing to make contributions to pension and health and welfare funds pursuant to the parties' expired 1986–1989 collective-bargaining agreement without first bargaining to impasse with the Union; (ii) unilaterally implementing its own health insurance plan without first proposing the plan to the Union and bargaining to impasse over its proposal; and (iii) withdrawing recognition from the Union, without a good-faith basis for believing that the Union no longer represents a majority of unit employees. The unit is:

> All full-time and regular part-time driver/warehouse A, lead/warehouse, utility/warehouse driver employees employed by the Respondent at its Richmond, California facility, excluding all other employees, office and clerical employees, guards, and supervisors as defined in the Act.

(b) Coercively polling its employees concerning their support for the Union.

change of position. Accordingly, we need not decide whether the Union's reneging on a proposal would have privileged the Respondent's unilateral implementation of its last offer with regard to health insurance.

[10] Because the provision of benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make whole'' remedy. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the unit employees for any losses they may have suffered as a result of the Respondent's failure to make pension and health and welfare contributions as required by the parties' expired collective-bargaining agreement in the manner set forth in the remedy section of this decision.

(b) On request, discontinue its unlawfully implemented health insurance plan for unit employees.

(c) Recognize and, on request, bargain collectively with the Union concerning wages, hours, and other terms and conditions of employment of unit employees and reduce to writing any agreement reached.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount due under the terms of this Order.

(e) Post at its facility in Richmond, California, copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

(f) Notify the Regional Director within 20 days of this Order what steps the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain in good faith with General Truck Drivers, Warehousemen, Helpers and Automotive Employees, Local 315, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining representative of the employees in the unit described below by: (1) failing and refusing to make contributions to the pension and welfare funds pursuant to our expired 1986–1989 collective-bargaining agreement without first bargaining to impasse with the Union; (2) unilaterally implementing our own health insurance plan without first proposing the plan to the Union and bargaining to impasse over our proposal; and (3) withdrawing recognition from the Union, without a good-faith basis for believing that the Union no longer represents a majority of unit employees. The unit is:

> All full-time and regular part-time driver/warehouse A, lead/warehouse, utility/warehouse driver employees employed at our Richmond, California facility, excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT coercively poll our employees to determine their union sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole our unit employees for any losses they may have suffered as a result of our failure to make pension and health and welfare contributions as required by our expired collective-bargaining agreement, with interest.

WE WILL, on request by the Union, discontinue our unlawfully implemented health insurance plan for unit employees.

WE WILL, on request, recognize and bargain collectively with the Union concerning wages, hours, and other terms and conditions of employment of unit employees and reduce to writing any agreement reached.

LOU'S PRODUCE, INC.

Gary M. Connaughton, Esq., for the General Counsel.
Christopher W. Katzenbach, of San Francisco, California, for the Respondent.
Andrew Baker, Esq. (Beeson, Tayer, Silbert, Bodine & Livingston), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Oakland, California, on October 4, 1990, and reopened September 5, 1991, on a complaint issued by the Regional Director for Region 32 of the National Labor Relations Board on June 15, 1990. The complaint is based on a charge filed by General Truck Drivers, Warehousemen, Helpers and Automotive Employees, Local 315, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) on May 11, 1990. It alleges that Lou's Produce, Inc. (Respondent) has committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act.

Issues

Specifically, the complaint alleges that Respondent violated Section 8(a)(5) and (1) by failing to make contractually required fringe benefit payments to the health and retirement plans, unlawfully polled employees regarding their sentiments and support for the Union, and withdrew recognition from the Union at a time when it was not privileged to do so. Respondent defends on the ground that it was privileged to stop the payments and substitute another health plan because the Union engaged in an unlawful peremptory declaration that the expired contract had renewed itself under the automatic renewal (evergreen) clause, thereby refusing to bargain over health plan changes before any change could be adequately presented at bargaining. It further asserts that the Union's conduct violated Section 8(b)(3) of the Act and privileged it to cease paying pension plan contributions. Insofar as the polling is concerned, Respondent asserts it was harmless saying the Union even accepted an offer to run a second poll with the Union's participation, and finally that it did not withdraw recognition until the Union withdrew from the agreement to participate in the second poll.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs and supplemental briefs. Both the General Counsel and Respondent filed briefs and supplemental briefs which have been carefully considered. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation, engaged in the wholesale produce business at its facility in Richmond, California, where it annually purchases and receives goods and services valued in excess of $50,000 from enterprises located within California, each of which enterprises had received those goods or services from points outside California. Respondent, accordingly, admits it meets the Board's indirect inflow standard for the assertion of jurisdiction. I therefore find that it is an employer engaged in commerce, and in an industry affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent has had a collective-bargaining relationship with the Union since at least the mid-1960's. During that time it has been owned by members of the Alessio family, perhaps in conjunction with others. In 1986 John Alessio sold the business to one of his sons, Mike Alessio, who coowned the business with a ''partner'' whose name is not clear in the record. According to an illegible signature her name appears to be Karen F____. At the time of the transactions being scrutinized, she was no longer involved with the business. However, in November 1986, she had signed an addendum to the 1986–1989 collective-bargaining contract.

That collective-bargaining contract was scheduled to expire on December 31, 1989. By that time Mike Alessio and his wife Nona were operating the business. It employs about six people in the bargaining unit, only two of whom are not family members. Among other things, the expiring collective-bargaining contract provided that Respondent pay for a Teamsters health plan known as Policy 1400 of the California Teamsters Welfare Trust. It is one of several plans offered by that Trust. The contract also provided for payments to the Western Conference of Teamsters Pension Trust Fund.

Although the parties did not give each other the contractual and statutory notices of termination or give notice to the Federal and state mediation agencies as required by Section 8(d) of the Act, they nonetheless began to bargain over a successor agreement sometime in September 1989. Business Agent Frank Coppa represented the Union while Mike and Nona Alessio represented Respondent. Although the contract contained an automatic renewal clause providing that if the parties failed to ''open'' the contract for renegotiation, it would renew itself for 1 year,[1] the General Counsel does not contend that the parties' failure to do so caused the evergreen clause to go into effect. The Union's position on that issue is that it did. Beginning in mid-to late February 1990 it began contending that the contract had renewed itself on January 1, 1990. That position was restated in its charge filed by counsel, and in some letters both before and after the complaint issued on June 15, 1990. At the time it began making that contention, Coppa had been replaced as the Union's bargainer by Business Agent John Plumos. Plumos was the individual who initiated that claim when it became apparent that the health plan renewal had become insurmountable.

B. *The Bargaining*

Between September and December 1989, the Alessios and Coppa met on two or three occasions to negotiate a new con-

[1] Sec. 14(2) of the 1986–1989 contract. It reads:

> If neither party to this Agreement prior to sixty (60) days before December 31, 1989, notifies the other party, in writing of its desire to change modify or terminate this Agreement, then the Agreement is automatically extended and renewed for the following year.

tract. The negotiations went smoothly in all respects except one, the issue of health insurance. There were two specific areas of concern. First, the per employee price of continuing the Policy 1400 plan seemed excessive to the Alessios. Nona Alessio describes their conversation on that subject:

> Q. [By Mike Katzenbach] Did you ever discuss with Mike—during those conversations, do you recall any discussion with Mike Coppa concerning the costs of the Union health plan?
>
> A. Yeah.
>
> Q. What did you tell—what happened there?
>
> A. I told him that my son has his own health plan which was Kaiser, and at the time it was $78 a month and Teamsters wanted $365 for the same coverage, and I said we just can't afford it. I mean, it's—you know, trying to save pennies everywhere I could.
>
> Q. Okay. What did Mike Coppa say in response to that?
>
> A. He was pretty nice. He understood. I mean, he said, ''Yeah, I know. It's tough all over.''

In an effort to reduce the overall costs of health insurance, Coppa's contract proposal of late November or early December included a switch from plan 1400 to another, known as plan III. This plan cost $290 per month per employee.

The second concern was coverage for casual employees. The fresh produce business is seasonal and Respondent has some difficulty in controlling the hours of extra or casual employees due to the timing of various harvests and connected shipments.

It is apparent from the testimony of both the Alessios and Plumos that the health and welfare trust has a rule, known as either the ''79 hour'' or ''80 hour'' rule which requires an employer who works an employee for more than 79 hours per month to pay full monthly coverage for him or her. The Alessios believe the rule works a severe hardship against it in situations where a casual employee is asked to work 1 or 2 hours over the limit. In such situations the trust would require, at least under its plans, as much as $365–$400 on behalf of such an employee.

The issue was not new. It had been resolved in 1986 in favor of Respondent which had obtained a waiver from the Union on that issue. Curiously, neither Mike Alessio nor Coppa could initially recall the 1986 waiver when they began to bargain in 1989. They did not have a copy. Indeed, the waiver is found in the addendum signed by Karen F____. in 1986.[2] During bargaining and while researching the problem, Nona Alessio came on it and showed it to them. Repeating the waiver seemed a promising solution to the problem. Indeed, Mike Alessio told Coppa that if he could get relief on the casuals health coverage, he could afford the other economic terms of the newly proposed contract.

Even so, both parties had difficulties with the waiver. Nona Alessio believed it was not clear enough. She knew it was inconsistent with the health trust's 79-hour rule and she was afraid the trust might not accept it as written. Second, she feared the trust might not accept Respondent's definition of ''casual employee'' as Respondent practiced it. Her latter fear may have been overly cautious and it may be that the remainder of the contract could have been used to properly define what the parties intended. Nonetheless, she told Coppa she wanted a waiver with greater clarity. At one point Coppa assured her that the previous language was adequate. In a telephone conversation he even told her that he had had his office secretary read it and that she had agreed with him that its purpose was clear. Nona Alessio, however, was not willing to accept that curbstone opinion. Finally, Coppa agreed both to try to draft clearer language and to get a letter directly from the trust to that effect. It is unknown what efforts he made in that regard, but he had not presented either alternate language or such a letter to the Alessios prior to the expiration of the contract on December 31, or before he was replaced by Plumos in January.

Plumos did not approach the problem as sympathetically. He apparently had marching orders to negotiate a health plan which was entirely consistent with the health and welfare trust's rules. Not only would he not follow through on Coppa's promise to try to tighten the waiver language, he would not accept the concept of a waiver at all. He would not even consider extending the waiver of the past contract or even ask the trust for the letter Coppa had offered to seek. Plumos testified:

> Q. [By Mike Katzenbach] Have you ever agreed to give him that, such a letter?
>
> A. No, I haven't.
>
> Q. Did he ask for that relief?
>
> A. Yes, I told him that the law stated—according to the trust plan, the 80-rule is for everybody. It doesn't exclude casuals or permanent employees. 80 hours and you have to pay.
>
> Q. How many times did you tell him? How many times did he ask you for relief and how many times did you tell he you couldn't give it to him?
>
> A. Three times.
>
> Q. All right. Did you ever tell him that you'd look into it? Did you check it out further?
>
> A. No, I—at the first meeting, I told him 80 hours and that's it.
>
> Q. And was that your position from the start—first meeting right through the last meeting?
>
> A. That's correct.
>
> Q. Is that your position today?
>
> A. That's correct.
>
> . . . .
>
> Q. [By Mr. Katzenbach] but the condition of being in the Union's health plan was that they would have to agree that if somebody works 79 or more hours, they would have to pay full benefits; is that correct?
>
> A. That's correct.
>
> Q. All right. And they couldn't have the Union health plan if they were not willing to agree to that term?
>
> A. We have cheaper plans.
>
> Q. You discussed your plan, right?
>
> A. Yes. My plan only.

[2] In pertinent part, the addendum contained the following language:

> (B) Casuals will not be guaranteed a daily or weekly minimum number of hours.
>
> (D) Casuals will not accrue seniority or be entitled to any benefits including but not limited to holidays, *health and welfare*, vacation, sick leave, funeral leave, jury duty, leave of absence, etc. [Emphasis added.]

Q. Your plan, the plan that you were talking about, was—all the plans require payments after 72 hours—after 79 hours, right?

A. That's correct.

Q. Every plan?

A. Every plan.

Q. All right. So that if they wanted to have the plan that they wanted to have, that you were discussing, it had to be with the condition of having full benefits for employees if they worked 79 or more hours, right?

A. That's all the plans that we have.

Q. They all require that?

A. Yes.

Q. There was no plan that you had that didn't require that?

A. That's correct.

Q. So there was no plan that you could offer them that gave them a deal that said if they worked someone more than 79 hours, they could have this plan?

A. That's correct.

It appears that beginning in January Plumos had four or five meetings with Respondent, some of which were not formal bargaining sessions. For example, Nona Alessio recalls that on one occasion in early January Plumos came by the office to introduce himself and to say that he was Coppa's successor. Pursuant to an appointment made by telephone on January 8, a meeting was conducted at Respondent's place of business on January 10. During that session, the Alessios tried to persuade Plumos that Coppa had essentially agreed to the waiver relating to the casuals. Although they could not convince Plumos, they did ask him to discuss the issue with Vince Aloise, who serves both as a member of the Union's executive board and as a trustee of the health and welfare trust. It was Aloise who had been behind the 1986 waiver.

Another meeting occurred on February 14. At that time Plumos had prevailed upon Aloise to attend. In addition, the Alessios obtained the presence of John Alessio, Mike's father and previous owner (now semiretired, but who continues to be employed), as well as its accountant, Fran Aires. It was during this meeting that the union representatives explained that the waiver was no longer acceptable.[3] It was also at this meeting that Respondent finally became convinced that the Union would not honor Coppa's apparent promise and would not grant the waiver relief at all.

Nona Alessio describes what happened next during an informal ''drop-in'' conversation with Plumos:

Q. [By Katzenbach] At the first meeting you had with Mr. Plumos, did he say anything about the contract rolling over?

A. No, it was about the second or third meeting that he mentioned that, the contract rolling over. He had come by—it was almost like a—just a social thing, just a check-in with you type thing. There was no meeting, he just dropped by. And he said, you know, ''We still haven't gotten this thing resolved.'' And I said, ''I don't know how we can. We can't afford to be in the Teamsters.'' And he said, ''Well,'' and he kind of smiled at me and said, ''Guess what? It rolled over.'' And I said, ''What are you talking about?'' And he said, ''Read your contract.'' And he kind of smiled at me. And I did, and he was right. It did say that, and I said, ''But we told —we talked about this''—not with him, but with Frank Coppa months before now, you know, I mean, it was all verbal, though, and I didn't, you know, give it to them in writing.

According to Nona Alessio, however, during the drop-in conversation, they then had a short discussion of whether the oral agreement they had with Coppa had forestalled the operation of the automatic renewal clause.[4] Plumos insisted that it had; she was puzzled, not quite believing him, but concerned with the language of the clause which seemed to say he was right.

The record does not show exactly when this conversation occurred, but it seems likely to have been within a week after the February 14 negotiation session. Neither does the record show exactly when she and Mike Alessio decided to act. Nonetheless, Mike Alessio testified that decisions were made to do three things: obtain substitute health insurance for their employees which was less costly; cease paying into the pension trust and poll the employees regarding whether they still wished to be represented by the Union. These decisions were not simultaneous but the first two were triggered, at least in part, by Plumos statements that the contract had rolled over and his informing them that the health and welfare trust would not permit the same waiver which it had provided for the 1986–1989 contract.

On March 6, the parties met again. Plumos testified that it was at that meeting he first told them the contract had rolled over. He testified:

A. [Mike Alessio] didn't want to have nothing to do with the Teamsters any more at that meeting.

Q. What did he say?

A. He didn't want to sign the contract and at that meeting I told him that it automatically extended.

Q. And what did he say if anything?

A. He said, ''You guys are getting too rich for my blood. I want out.''

It is undisputed that at this meeting,[5] for the first time, Mike Alessio told Plumos that he had purchased substitute

[3] Some of the discussion between Aloise, Aires, and John Alessio centered on an old debt which Respondent owed the trust and was making an effort to pay. That issue is not a part of this charge or complaint, although the topic was discussed at several bargaining sessions.

[4] An automatic renewal or ''evergreen'' clause typically provides that if the parties to a collective-bargaining contract fail to give written notice of the contract's termination to each other by a deadline (usually 60 days before the contract's expiration date), the contract will renew itself without change for another year. The evergreen clause here follows that pattern. See fn. 1, supra. The Board, however, has held that if the parties actually begin bargaining before the contract expires, they will be deemed to have waived the requirements that the notice of termination be in writing or that it be timely. The General Counsel concedes the rule applies here. I agree. *Ship Shape Maintenance Co.*, 187 NLRB 289, 291 (1970); *Hassett Maintenance Corp.*, 260 NLRB 1211 fn. 3 (1982); and *Industrial Workers AIW Local 770 (Hutco Equipment)*, 285 NLRB 651 (1987).

[5] The March 6 meeting seems to have been relatively short. The majority of it was spent discussing the debt which Respondent owed the health trust and in that sense was a continuation of the February 14 sidebar involving Aloise on that matter.

health coverage from Kaiser Permanente. At that time he also referred to the fact that he had conducted a poll of the employees to determine if they wished to remain repre sented by the Union. There is a dispute regarding whether this was the first time he had mentioned the poll. Plumos testimony suggests that it was and that Alessio had said the polling was done by a show of hands; Mike Alessio says the poll was first mentioned in a telephone conversation prior to the March 6 meeting. He remembers a discussion with Plumos in which Plumos asked if the poll had been conducted by secret ballot and discussing whether such a poll was valid or should be redone with Plumos participating. Alessio says he agreed in that telephone conversation with Plumos request to conduct the poll a second time.

It appears from the evidence that the poll had been conducted on February 5 and that it was by written ballot. It was, however, not secret as the ballots contained a signature line. Even so, it was not discussed at the February 14 meeting. Until then, of course, Respondent still held out the hope that Union would continue to grant the waiver. It seems likely, therefore, that Respondent was hedging its bet. It had not yet, except for arming itself with the information about the poll, taken any definitive action with respect to changing its relationship with the Union or making any unilateral changes. Indeed, as Alessio said, Respondent did not ''join'' the Kaiser health plan until March 1.[6] Clearly Respondent purchased the Kaiser plan not because it was trying to dodge the Union, but because the Union wouldn't budge on the bargaining issue and had taken the definitive and reactive stance of declaring the old contract to have renewed itself.

In fact, the Union's posture on this point continues, even though the General Counsel discounts it. On April 9, 1990, the Union's lawyer wrote Respondent a letter referring to Respondent's apparent disavowal of its continuing obligation to comply with the terms of the ''current collective bargaining contract.'' (R. Exh. 2.)[7] Moreover, the unfair labor practice charge which the Union filed, also through counsel, expressly asserts that Respondent has violated the ''current'' collective-bargaining agreement and has ''repudiated'' it ''mid-term.'' (G.C. Exh. 1(a).) Even after the complaint was issued, the Union continued to maintain that the 1986–1989 contract had rolled over. An exchange of letters so shows. On July 11, 1990, Respondent's attorney, Katzenbach, wrote Plumos asserting, inter alia, that the bargaining had come to an impasse. Plumos responded with a letter to Mike Alessio dated July 27, offering to set up meetings to resolve the contract. (G.C. Exh. 9.) On August 2, Katzenbach replied, offering to bargain for the Company, saying, ''I assume from your letter that the Union is no longer contending that the old contract rolled over for an additional year. Nevertheless, I would appreciate that you would confirm this in writing.'' (R. Exh. 4.) By letter dated August 8, Plumos stated that he would be available to bargain, but also saying, ''The Union does maintain that the contract is in effect from 1/1/90 through 12/31/92.'' This statement shows that the Union believes the contract to have rolled over not for just 1 year but for 3. Clearly, the Union's conviction on the rollover is strongly held. I must assume its belief was just as fierce in February when Plumos told Nona Alessio that Respondent was stuck with the contract. That was the Union's belief then and is still its belief.

C. *The Poll*

As touched on previously, Mike Alessio conducted a poll of Respondent's employees on February 5. The General Counsel argues that that date should be disregarded because, he says, it is the product of leading testimony. That observation, Although partly true, is not a complete recitation of what occurred. In fact, Mike Alessio's testimony is the product of refreshed recollection. He could not initially recall the date as he testified and Respondent's counsel, following the rules on such matters, showed him a document which refreshed his recollection. It should not be regarded so lightly as simply the result of a leading question. Certainly no evidence elsewhere contradicts his refreshed recollection.

On that day, about 1 p.m., after the majority of the day's work was over and after the drivers had returned from their routes, Mike Alessio distributed ballots to the employees. Headed ''Teamster Union Status,'' it proposed the following: ''I wish to remain with the Teamster Union at Lou's Produce,'' followed by ''yes'' and ''no'' boxes for the voter to check. This was followed by a signature line. All the ballots in evidence are signed. It is undisputed that Mike Alessio did not follow any of the safeguards which the Board has long required since its decision in *Struksnes Construction Co*., 165 NLRB 1062 (1967). Under *Struksnes*, a poll will be found lawful if it meets the following criteria: (1) its purpose is to determine the truth of a union's claim of majority; (2) that purpose is communicated to the employees; (3) the employer gives the employees assurances against reprisals; (4) the polling is by secret ballot; and (5) it occurs in a context free of other unfair labor practices.

Mike Alessio says he told Plumos of the poll in a telephone conversation. He also says a second telephone conversation followed sometime prior to March 6. In the second call, he says, Plumos challenged the poll's validity. Mike Alessio says, ''Plumos brought it to my attention that the election that I had taken was illegal and that he would have to administer an election.'' Alessio says they set a second election for a Thursday afternoon. He advised his employees of the second election, but says it was never held because Plumos asked to postpone it. He says Plumos never got back to him for rescheduling. Frank Alessio, Mike Alessio's younger brother and a bargaining unit member, recalls Mike telling him that a second election would be required and also recalls that a date and time were set, but was unable to be any more specific.

Plumos contends that the only time he heard about an election was on March 6 when Mike Alessio told him, in response to a health plan discussion, ''No, I don't want you. We already got our health—we already got our health and

[6] I think it is fair to assume that between February 14 and March 1, Respondent took the steps necessary to purchase the Kaiser plan. There is no evidence in the record regarding the length of lead time which Kaiser requires to arrange for such a group purchase and even the 2 weeks involved seems pretty short. Perhaps Respondent had begun inquiring even before the February 14 meeting because of the poll. But that allows for only 1 additional week. Most likely the absolute rejection of the waiver and the knowledge that the Union was claiming ''rollover'' triggered a hasty Kaiser purchase. That is consistent with Nona Alessio's testimony.

[7] R. Exhs. 1, 2, 3, and 4 were originally rejected and placed in the rejected exhibit folio. At the reopened hearing they were all received in evidence, although they are still contained in that folio.

welfare now. We had an election. You guys are voted out.'' Plumos says he asked him, ''Well, was it a secret ballot?'' Plumos says Mike Alessio responded, ''No, it wasn't a secret ballot. Everybody just come in here and raised their hand. As they walked in the door, they raised their hand.'' Plumos says he told Alessio, ''I should have been present at this election that you had'' also saying to Alessio that it was unlawful for Alessio to have held the election without the Union being there.

I must observe here that Plumos testimony does not comport with probability. The ballots clearly were in writing. Why then would Mike Alessio tell him it was by a show of hands. Up to that point Respondent had been entirely honest with the Union. To be sure, it was unhappy with the Union's having, from Respondent's point of view, reneged on the waiver. Even so, that does not seem to be a motive to lie about whether the vote had been by written ballot. On the other hand, Plumos would appear to have a greater motive to stretch the truth here. He is well aware that the Union's case is enhanced by proof of the contention that it did not learn of the poll and the health plan change until March 6. Furthermore, he does not want to admit to any error regarding having agreed to a second poll at an earlier time. That would be embarrassing. I conclude, therefore, that of the two versions, Mike Alessio's is the most likely. Furthermore, it suggests that Plumos's testimony on other matters must be considered carefully. In this regard, I find his testimony that he first told Respondent that the contract had rolled over on March 6 to be a similar stretch.

D. *The Pension Issue*

When Mike Alessio realized the 1986–1989 contract had expired on December 31, 1989, he recalled that in 1986 the pension trust had refused to accept payments during what he regarded as a similar hiatus. When he and his ''partner'' purchased the corporation from his father, Respondent had continued to make payments to the pension trust. Later, during an audit, the trust realized that the corporation's owner was different from the previous owner. It concluded that it was improper to accept payments from Mike Alessio for it had no collective-bargaining contract with Respondent signed by him; accordingly, it refunded Respondent's payments for the period of time preceding the signing of the 1986–1989 contract on the grounds that it could not accept payments in the absence of a collective-bargaining contract. Whether the trust's conclusions were legally correct is not for me to say. Nonetheless, relying on the trust's analysis, Mike Alessio decided that it would not accept pension contributions until a new collective-bargaining contract was signed. Therefore, Respondent made no payments to that plan in 1990.

However, according to (G.C. Exh. 5) a notice from the pension trust, Respondent was not delinquent in its 1990 payments until March 11, some 5 days after the March 6 collective-bargaining meeting and approximately 2 or 3 weeks after Plumos first declared the collective-bargaining contract to have rolled over.

E. *The Alleged Withdrawal of Recognition*

The complaint alleges that at the March 6 meeting, Respondent withdrew recognition of the Union as the collective-bargaining representative of the bargaining unit employees. The evidence relied on by the General Counsel has been touched on in reference to other issues. Nonetheless, I shall recount it here.

In section C, above, regarding the poll, Plumos quotes Mike Alessio as having said, on March 6, ''We had an election. You guys are voted out.'' At another point, mentioned in section B, he says Alessio made a similar remark on March 6 only after Plumos told him the contract had rolled over. At that point Plumos recalls Alessio responding, ''You guys are getting too rich for my blood. I want out.''

Although occurring after the issuance of the complaint, it is worthwhile to recall that on July 11, 1990, Katzenbach wrote Plumos asserting that the bargaining had come to an impasse. Plumos responded offering to set up meetings to resolve the contract and on August 2, Katzenbach offered to bargain for the company, saying, ''I assume from your letter that the Union is no longer contending that the old contract rolled over for an additional year. Nevertheless, I would appreciate that you would confirm this in writing.'' And, as previously noted, Plumos not only did not confirm abandonment of that position, he extended the claim for an additional 2 years.

IV. ANALYSIS AND CONCLUSIONS

Based on the foregoing factual recitations, I conclude that Plumos, in mid- to late February 1990, told Nona Alessio that the 1986–1989 collective-bargaining contract had renewed itself. He did it because he perceived, correctly, that there was no reasonable likelihood that Respondent's needs could be satisfied with the health plans which the Union could offer. He had no authority to offer any other plans and the only way he could think of to preserve the Union's health plan was to impose it. He knew that neither the Union nor Respondent had by written notice opened the contract for renegotiation as required by its terms and by Section 8(d) of the Act. He undoubtedly recognized it as a ready excuse to justify the rollover claim. He also knew that it was only a matter of time before Respondent formally rejected the union-sponsored health plans and proposed something else, likely the Kaiser plan. He knew the union plans were a financial burden, knew there were less expensive plans available on the market, and knew none of the union plans permitted the relief on casual employees which Alessio said he needed.

At that point Plumos was himself in a box. He could not offer what Respondent was willing to accept. He knew the entire contract turned on the health issue. He had become stuck; he had no intention of offering any other health plan, undoubtedly because he had no authority to do so. The health trust would not allow the waiver and it had no cheaper plans to offer. His resolution of that problem was to force the old health plan down Respondent's throat and hope that he could persuade them that the old contract permitted him to do so. Accordingly, he preempted Respondent's foreseen proposal of a nonunion-sponsored health plan by telling Nona Alessio that she was stuck with the old contract, using the available justification, invocation of the evergreen clause. That first occurred during his social visit with her, occurred again during some telephone conversations and, by the time they met on March 6, was not news to the Alessios. It is what had caused them to ''join'' the Kaiser health plan on March 1.

Plumos decision to tell them that the contract had renewed itself was a clear violation of Section 8(b)(3) of the Act. This is a literal refusal to bargain. His peremptory act of declaring the contract to have renewed itself in that circumstance is little different from the ''It's the short form or nothing'' found to have created an unwarranted impasse in *R. A. Hatch Co*., 263 NLRB 1221 (1982), or the union's refusal to acknowledge a proper reopener in *Carpenters Local 743 (Armstrong & Smith Construction)*, 261 NLRB 425 (1982). In the latter case, the purpose of the refusal was to deliberately impose the master contract on an employer not party to the multiemployer unit. It has long been the law that if a union acts in such a way as to prevent the parties from reaching a collective-bargaining contract, it will violate Section 8(b)(3). See *Carpenters Local 964 (Contractors of Rockland County)*, 181 NLRB 948 (1970), enfd. 447 F.2d 643 (2d Cir. 1971). Here, it seems to me, Plumos declaration that the contract had rolled over is self-evident proof that he did not wish to negotiate a new collective-bargaining contract. Instead, he wished to avoid the bargaining table, because he knew it would eventually result in a health plan which was not union sponsored.

The General Counsel, in his supplemental brief, appears to acknowledge that the Union has stepped over the line. He asserts, first, that it occurred after Respondent committed the first unilateral change and, second, that it was transitory and in response to a difficult bargaining situation. His proof on both points falls short. It is clear to me that, even though exact dates are uncertain, the only logical sequence of events is that the Union, recognizing that the health plan issue had become insurmountable, desperately decided to preempt it by reverting to the old plan through a declaration of rollover. It knew, even during Coppa's tenure as union negotiator, that it was a serious problem. Coppa, it may be presumed, ran into the same opposition to renewing the previous waiver from the trust which Plumos later described. That is why he did not return to the Alessios with a favorable report. Indeed, his failure to testify supports that conclusion.

Clearly, Respondent made no unilateral changes until March 1 when it put the Kaiser plan into effect. That is not to say that it wasn't aware that the problem needed solving. It was just as aware as the Union that the health plan issue was truly difficult. Furthermore, the Alessios are somewhat naive with respect to their obligations under the NLRA. They did equate the collective-bargaining relationship as simply another commercial agreement which might go unrenewed on its expiration. For that reason they were likely to begin searching for another plan early in 1990. Even so, they knew that some of the employees might wish to retain union representation. That is the reason Respondent conducted the poll in early February. Yet, it did not mention that poll or use it as a weapon in bargaining during the February 14 negotiation meeting. Undoubtedly it did not do so because it wished to give the Union every opportunity to come up with an acceptable health insurance plan. Mike Alessio testified that some of his employees, according to discussions during the poll, thought that health insurance was the most important benefit of employment. Clearly, he wanted to honor that concern if he could and was willing to entertain a union-sponsored plan which met Respondent's needs. It was hoped the February 14 meeting would resolve the problem. Therefore, he did not inject the results of the poll into the mix until well after the February 14 meeting, no doubt in a conversation he had with Plumos on the telephone as he said.

It was the Union's rejection of the waiver at the February 14 meeting which led Mike Alessio to conclude he must find health insurance elsewhere. Accordingly, he began looking into it. Even so, it is not clear that he intended to implement it without first negotiating with the Union. But, when Nona Alessio learned from Plumos during that same period that the Union was declaring that the contract had rolled over, that confirmed to Mike Alessio that he would have to put the Kaiser plan into effect. He did so, as noted, on March 1.

Moreover, the General Counsel is incorrect in his assessment that the Union's position was transitory and only a response of frustration. I agree that Plumos was in a frustrating position, but his stance was not simply ''bluster and banter.'' If it had been, we would not have seen it continue through the May 11, 1990 unfair labor practice charge and the subsequent correspondence. The Union to this day has not abandoned the claim of rollover, even claiming a contract of 3 years' duration. Although the General Counsel may argue that Respondent's argument on the point is simply hindsight, he was not there and could not observe the parties in action at the table or in those conversations away from the table. The Alessios, on the other hand, were participants. Their judgment of what was occurring cannot be lightly tossed away as simply lucky hindsight. Indeed, subsequent events have confirmed the accuracy of the Alessios' observation: the Union was, and still is, determined to impose a union sponsored health plan on Respondent through its declaration of a lengthy contract renewal. Clearly, that conduct constitutes a violation of Section 8(b)(3) of the Act. *Mailers Local 89 (Little Rock Newspapers)*, 219 NLRB 707 (1975); *Industrial Workers AIW Local 770 (Hutco Equipment)*, supra.

In that circumstance, I find that Respondent was privileged to deal with the health plan problem and other collective-bargaining matters in a reasonable way. Finding alternate health coverage clearly is an acceptable way of treating with the Union's unlawful adamancy on that very point. It is true that Respondent did not propose the Kaiser plan to the Union and one might think at first blush that the failure breached the *Taft Broadcasting* rule.[8] That rule generally requires, in the event of impasse, that a party can only implement the terms of its last proposal for the purpose of breaking an impasse or else be in breach of Section 8(a)(5). That rule, however, does not apply in circumstances where a final proposal has been unlawfully interdicted as here. Specifically, see *Young & Hay Transportation Co*., 214 NLRB 252, 253 (1974), affd. sub nom. *Teamsters Local 554 v. Young & Hay*, 522 F.2d 562 (8th Cir. 1975). In that case, when the union attempted unilaterally to merge a newly organized bargaining unit with an established one (an act which certainly violated Sec. 8(b)(3)), the Board found the employer privileged to unilaterally implement a wage increase and fully paid health insurance because the union had refused to bargain in any unit other than the merged unit. Similarly, see *Goodyear Tire & Rubber*, 217 NLRB 73, 78–79 (1975). Again, the union committed a breach of the bargaining obligation, unlawfully insisting that a successor employer adopt the collective-bargaining contract of the predecessor and refusing to otherwise

[8] *Taft Broadcasting Co*., 163 NLRB 475 (1967), affd. 395 F.2d 622 (D.C. Cir. 1968).

deal with the successor. As a result, the successor implemented an entire economic package covering both wages and fringe benefits even though it had not clearly advised the union what was contained in that package, apparently because the union would not meet. The administrative law judge found the implementation to be lawful and Board affirmed.

The next question is to what extent Respondent may make other changes. Clearly this Respondent was faced with an impasse which it could not break by making proposals. The Union was claiming a contract was already in effect, one which all parties knew had actually expired. What duty, in that circumstance, did Respondent have with respect to continuing to pay into the pension trust? It is true that Mike Alessio intended to stop paying the pension trust in the naive belief that it would not accept payments so long as there was no signed contract in effect. Even so, had the Union not then taken the position that the old contract had rolled over, and assuming the health insurance issue could have been resolved, all parties agree that a new contract would have been signed shortly. Had that occurred, Respondent would have paid the trust's contributions, at the time the agreement was signed, perhaps a little late. But the Union's conduct did not allow that to happen. Instead it went off on its unlawful tangent; it did so before the pension trust claimed Respondent was in arrears. Respondent was not to be considered in arrears until March 11, but the Union had begun claiming the rollover in mid- to late February and had confirmed it on March 6. In that circumstance, I find that Respondent did not commit any violation of the bargaining obligation. It was privileged to break the impasse by not paying the trust, even if that was not Mike Alessio's original intent.

In this regard, *Inland Tugs v. NLRB*, 918 F.2d 1299, 1308–1310 (7th Cir. 1990), is instructive. Noting certain language of *Teamsters Local 554 v. Young & Hay*, supra at 566, the court held ''[T]he innocent party need not negotiate as long as the bargaining is forestalled by the illegal demand.'' See also *Louisiana Dock Co. v. NLRB*, 909 F.2d 281, 286 (7th Cir. 1990). The *Inland Tugs* court cites two Board cases which support that proposition, *Midwestern Instruments*, 133 NLRB 1132, 1141 (1962); and *Nassau Insurance Co*., 280 NLRB 878, 891–892 (1980). In both cases the trial examiner and administrative law judge found the duty to bargain suspended during the pendency of the union's unlawful conduct. In *Nassau*, the duty was suspended even where the unlawful conduct was violent activity, not simply an unlawful bargaining stance. I find, therefore, that the Union's conduct here permitted Respondent to suspend bargaining altogether, including suspending its obligation under Section 8(d) to continue to make payments to the pension fund. In that circumstance it is unnecessary to determine what affirmative steps Respondent might have been permitted to take in addition to the defensive steps it did take.

Insofar as the allegation that Respondent improperly withdrew recognition about March 6, the General Counsel's evidence consists primarily of Plumos's testimony that Alessio said the Union had been voted out and/or that the Union was getting too rich for his blood and he wanted out. Noting what happened afterward, that Respondent offered to bargain some more, to which Plumos replied that the old contract was still deemed to be in effect, it is clear to me that Respondent never actually withdrew recognition. Indeed, it seems to me that the remarks which Plumos says Mike Alessio made are inconclusive in any event. Moreover, if Respondent was privileged to withhold bargaining while the Union continued its unlawful stance, Respondent's temporary hold on bargaining did not even constitute a withdrawal of recognition. *Goodyear Tire & Rubber*, supra. Accordingly, both on the facts and on the law, Respondent did not withdraw recognition of the Union in a manner which breached the Act.

However, the Union's unlawful bargaining stance had nothing directly to do with its polling of employees on February 5. That position had not yet crystallized. Even if it had, the Union's bargaining posture, though unlawful, does not extend to permitting coercive acts in response. It is clear that Respondent had no objective criteria for conducting a poll at the time. The Union was not claiming majority status; it already had it. Moreover, Respondent had no reason to think that the Union's majority status had changed. It was only concerned that the health insurance issue could not be resolved and wanted information about the Union's strength for possible use at the bargaining table. Therefore, it was not justified in conducting a poll. See *Montgomery Ward & Co*., 210 NLRB 717 (1974), and *Texas Petrochemicals Corp*., 296 NLRB 1057 (1989), remanded on other grounds 923 F.2d 398 (5th Cir. 1991). It is clear that Mike Alessio has admitted to a violation of Section 8(a)(1) with respect to the polling. Clearly the vote was conducted without any of the *Struksnes* safeguards which are recounted supra at 9. Nor was advance notice given the Union as required by *Texas Petrochemicals*. Therefore, an unlawful interrogation of employees regarding their union sympathies and desires has occurred. Moreover, it is no defense that Respondent offered to conduct a second poll with the participation of the Union. Even crediting Mike Alessio's testimony, which I do, that Plumos agreed to participate in another poll, that would not undo the effects of the unlawfully conducted first poll. Had the second poll actually occurred, perhaps a waiver might be inferred. It did not and I am unable to see how employee rights are protected by finding the defense valid. Accordingly, Respondent's defense to the poll is rejected. The poll violated Section 8(a)(1). Because its results were never used for bargaining purposes, I decline to find that it also violated Section 8(a)(5).

THE REMEDY

Having found Respondent to have engaged in certain violations of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce, and in an industry affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On February 5, 1990, Respondent violated Section 8(a)(1) of the Act when it conducted a poll of its employees

to determine their union sympathies, sentiments, and desires at a time when it had no objective justification for doing so and because it conducted the poll without properly safeguarding its employees from any coercive effect the poll may have had.

4. Respondent has not engaged in any other unfair labor practice as alleged in the complaint.

[Recommended Order omitted from publication.]